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The UN Charter, Human Rights Law, and Contingent Pacifism

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THE UN CHARTER, HUMAN RIGHTS LAW, AND CONTINGENT PACIFISM

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In this paper, I will argue that new developments in both the *jus ad bellum* law of the use of force, and the *jus in bello* law of armed conflict, have moved international law quite close to the position of contingent pacifism. The UN Charter was meant to eliminate recourse of war as we had known it.[1] And this continues to be the way the Charter is viewed today as a source of *jus ad bellum* law. In addition, there is a movement that sees that war cannot be conducted *jus in bello*, as we have, and still have respect for human rights. International humanitarian law has in the past largely followed the Just War tradition in regarding some wars as just even though war involves the intentional killing of humans. But that is changing with the human rights revolution that is sweeping across international law.

I will proceed by first discussing the general framework of *lex ferenda* international law that is beginning to influence *lex lata* international law. Second, I shall briefly discuss a new version of pacifism today, contingent pacifism, which seems especially close to where international law is moving today. I then spend several chapters first on the *jus ad bellum* and then several chapters on the *jus in bello*. In the third section, I will set out an argument that the UN Charter, as a source of *jus ad bellum* law, is nearly a contingent pacifist document. In the fourth section, I discuss

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1. *See* U.N. Charter art. 1, para. 1-4.

various court cases that interpret the UN Charter as holding something close to a contingent pacifist position. In the fifth section, I discuss how some scholarly commentators have come to understand the UN Charter's position on the justifiability of a State initiating war or armed conflict.

In the sixth section, I will describe a very recent controversy about the *jus in bello*, the way war or armed conflict is conducted, namely the conflict between human rights law and international humanitarian law. In the seventh section, I will discuss various ways that theorists and courts have sought to reconcile the two regimes of international law, especially concerning the doctrine of *lex specialis*, explaining why this attempted reconciliation moves international law closer to contingent pacifism than it had been. In the eighth section, I will describe the way that 18th Century texts on the laws of war provide a background for today's debates, where there were very serious restraints on killing during war. In the ninth and final section, I offer some concluding thoughts about how *jus ad bellum* and *jus in bello* are understood, or should be understood, in international law today. While somewhat controversial, my interpretation of the role of the UN Charter in *jus ad bellum* law, and the place of human rights law in the *jus in bello* law of armed conflict, at least at the level of *lex ferenda*, shows that international law is moving toward a position that is close enough to contingent pacifism to be worth noting and investigating.

I. AN EMERGING FRAMEWORK IN INTERNATIONAL LAW

In this first section I will set out the framework of emerging international law that seems to me to be close to pacifism. Then after a brief section on pacifism I will develop the arguments of the current section throughout the rest of the paper. The overarching idea behind the paper is that there is a strong current in *lex ferenda* (what law should be) international law, that is creating a new framework that is beginning to affect *lex lata* (what law is) international law.

The Oxford Encyclopaedic Dictionary of International Law states as a matter of fact that recourse to war is outlawed in international law.

> In the attempts by the international community to prevent war, two instruments stand out. The General Treaty for the Renunciation of War (the Kellogg-Briand Pact) of 27 August 1928 (94 L.N.T.S. 57) condemned 'recourse to war

> for the solution of international controversies and renounc[ed] it as an instrument of national policy ...' (art. I); and the Parties undertook to settle all disputes or conflicts by peaceful means (art. II). The U.N. Charter, in art. 2(4), requires all members to refrain from the threat or use of force; and art. 2(3) requires all members to settle disputes by peaceful means 'in such a manner that international peace and security, and justice, are not endangered'. The fact that war is, under contemporary international law, outlawed and therefore illegal does not mean that the conduct of any war is outwith the accepted rules on warfare[.][2]

This is a statement about *jus ad bellum* as we see at the end, not *jus in bello*. But what is perhaps jarring is that the idea of war being illegal is presented as an uncontroversial fact of international law.

Since the end of World War I, many documents and scholars have confirmed the idea that war or armed conflict is illegal in international law. I will spend time in Sections III-V of this paper setting out some of the most important of these legal documents and arguments. But I should note that international law scholars are by no means in agreement that war is outlawed, primarily because of a controversy about how to understand the relationship between Article 2, discussed by the Oxford Dictionary authors, and Article 51 of the Charter, which seems to provide an exception for wars of self-defense, to the general prohibition of States to initiate war. Nonetheless, I will argue that the UN Charter, as one of the main sources of international law concerning *jus ad bellum*, is nearly a contingent pacifist document.

Jus in bello matters are quite different. The main body of law here is international humanitarian law which does not regard all strategies and tactics of war to be outlawed. Indeed, international humanitarian law seems to follow the Just War tradition in seeing only those tactics that target civilians or cause unnecessary or superfluous suffering to be illegal. Many, if not most, strategies and tactics of war are seemingly legal. In terms of international humanitarian law, there is no support for *lex lata* outlawry of war.

Yet, it will be my argument, advanced in Sections VI-VIII, that the *lex ferenda* law of war is changing. The main reason for such a change is that various court opinions, advisory statements, and scholarly pronouncements are urging that human rights law be

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2. Outlawry (of war), in ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW (John P. Grant & J. Craig Barker eds., 3rd ed. 2009).

seen as having wide overlap with international humanitarian law. And here what is important is that human rights law does not seem to allow the intentional killing of one person by another—a practice that has been characteristic of war for millennia. Human rights law's very strong support for the right to life is not easily reconciled with strategies and tactics of war. So, there is an argument to be made in support of the claim that strategies and tactics, and other matters subject to the laws of war, should be seen as illegal, as a matter of *lex ferenda*, and this is likely to affect future *lex lata* understandings of the law of war.

The central claim of the paper is that international law, as a matter of *lex ferenda* if not *lex lata*, is close to pacifism, at least to what I will call contingent pacifism. The paper is an attempt to sketch the broad contours of the argument for this claim. Given the contemporary debates in international law, my claim may seem quite radical. Many of my arguments draw on very recent, and often controversial, sources such as the International Committee of the Red Cross's *Interpretive Guidance on Direct Participation in Hostilities*.[3] But I will also draw on the text of the UN Charter, arguably the most important source of international law on the use of force by States (*jus ad bellum*).[4] And I will also draw on the St. Petersburg Declaration, one of the first statements of the law of war (*jus in bello*).[5] I will also draw on several important decisions of the International Court of Justice. So, while my primary argument is normative, I also advance arguments about an alternative way to understand significant sources of *lex lata* international law. In the next section I will explain what I mean by pacifism.

II. CONTINGENT PACIFISM

The main idea behind most traditional pacifist accounts is quite simple, namely that it is morally unacceptable for practices or institutions to be designed that countenance the intentional killing of those who are innocent, of which war is the prime example. In many of these views, it is also wrong to kill anyone, whether innocent or not. But the highly intuitive argument that many have found appealing is that all wars involve the intentional killing of innocent people and hence that all wars are morally wrong. In

3. INT'L. COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 79 (Nils Mezler ed., 2009) [hereinafter ICRC's Guidance].

4. UN Charter, *supra* note 1.

5. Declaration Renouncing the Use in Time of War of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 297 [hereinafter St. Petersburg Declaration] *available at* http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=568842C2B90F4A29C12563CD0051547C.

addition, some early pacifists argued that we should not allow ourselves to become tainted, especially by our association with killing, with the blood of others on our hands. Moral purity calls for no one to kill anyone else. And a third strain in pacifist thinking is closely tied to the Just War tradition, where it is argued that no current, or even past, wars can meet the standards for a just war. These three ideas, either separately or in combination, are the main ideas associated with traditional pacifist positions.

Traditional pacifism has generally not advanced the type of arguments that are capable of persuasively showing that all wars are morally wrong. This is primarily because there may be wars in the future that are so different from wars in the past that the innocent will not be killed or even that killing will not be done by human hands. But traditional pacifists offered significant, and highly plausible, arguments given for why we should be highly suspicious of whether any given war can indeed be justified. The probability that any especially contemporary war will be unjust is very high and that this seems clear is a testament to the insights of traditional pacifists who provided many arguments against war over the years. But the scope and extent of those arguments needs to be refined in a way that will provide support for a different kind of pacifism than that embraced explicitly by earlier pacifists.

In contrast to traditional pacifism is contingent pacifism. As I use the term, "contingent pacifism" admits the possibility of a just war, such as World War II, but not at the current time or into the foreseeable future due to the nature of contemporary war and geopolitics.[6] The contemporary doctrine of contingent pacifism admits that in principle some wars can be just; it is simply that very few if any are just, and today nearly all wars are problematic morally. Contingent pacifists do not have absolute principled reasons to oppose violence, or even to oppose all wars. Rather they are opposed to war because of a concern that war will *likely* involve killing the innocent or on grounds of other moral risks of participation in contemporary wars. Contingent pacifism calls for a case-by-case assessment of whether a given war involves the moral risks that make participation in that war morally problematic. As with other theorists who have argued for this position, sometimes called "just war pacifism," the Just War tradition's criteria for

6. *See* Larry May, *Contingent Pacifism and the Moral Risks of Participating in War*, 25 PUB. AFF. Q. 95 (2011); Larry May, *Contingent Pacifism and Selective Refusal*, 43 J. OF SOC. PHIL. 1 (2012); Larry May, Contingent Pacifism: Human Rights, International Law, and Conscience, (unpublished book length manuscript) (on file with author). *See also* Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 69 (2010).

jus ad bellum and *jus in bello* are central criteria by which war is to be judged morally problematic.[7]

Contingent pacifism is hard to define as a simple doctrine because it has so many aspects that cannot easily be assimilated into one simple statement. Nonetheless, I will here provide a first approximation. Contingent pacifism is the doctrine that armed conflict is in principle justifiable but that it is unjustified now and into the foreseeable future due to a concern for the risk of civilian casualties and suffering and also for the risk of combatant casualties and suffering. Here we can see several elements: (a) the admission that war or armed conflict is in principle justifiable, (b) the condemnation of war or armed conflict today, and (c) the condemnation of war or armed conflict into the foreseeable future. The conditions that make for opposition to war today are contingent on such factors as: (a) the increasing percentage of civilians killed in armed conflicts; (b) the increasing likelihood that armed conflicts will be fought in cities rather than on traditional battlefields; and (c) the increasing amount of effort and money spent on armaments, as opposed to diplomacy.

In the rest of this paper I will address current developments in *jus ad bellum* and *jus in bello* international law. I will argue that such developments are close to supporting a version of contingent pacifism. War as it is often understood today cannot be initiated as it had in previous times and war cannot be conducted in a legal way according to the new human rights approach, which has its roots in the 19th Century understanding of the rules of war. So, from both a *jus ad bellum* and *jus in bello* perspective, war must be reconceived and what arises is the *lex ferenda* idea that war is unjustified at least as war has been understood for millennia.

III. THE UNITED NATIONS CHARTER

The Charter of the United Nations had as one of its most important goals to eliminate war. It is often commented that realizing this goal is no closer now than it was in 1945 when the Charter was drafted.[8] But it is also true that the Charter sets very severe restrictions on war, which if realized would indeed look like something close to contingent pacifism. In the next three sections I will argue that there is a highly plausible case today for seeing the

7. *See* JENNY TEICHMAN, PACIFISM AND THE JUST WAR 63-68 (1986); ROBERT L. HOLMES, ON WAR AND MORALITY, 183-213 (1989); James P. Sterba, *Reconciling Pacifists and Just War Theorists*, 18 SOC. THEORY & PRAC., 21 (1992).

8. *See, e.g.*, MARK JANIS & JOHN E. NOYES, INTERNATIONAL LAW: CASES AND COMMENTARY 419 (1997).

United Nations Charter, and even the United Nations itself, as embracing principles close to those of contingent pacifism.

The Preamble to the 1945 Charter of the United Nations begins in the following broad and evocative manner:

> We the Peoples of the United Nations [are] Determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small....[9]

Notice that the first thing mentioned is "to save succeeding generations from the scourge of war. . . ."[10] And notice also that war is associated with the term "scourge" already giving the reader the idea that war is not a favored institution. Of course, the point to emphasize in general is that the United Nations is established to save people from the scourge of war, seemingly implying that war as it had been known should end with the founding of the United Nations.

Article 1 of the United Nations Charter lists as the first purpose and principle of the United Nations:

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustments or settlement of international disputes or situations which might lead to a breach of peace;[11]

The first purpose and principle of the United Nations is to maintain the peace and by implication to avert war. Of course it is also true that maintaining the peace could involve the suppression of acts of aggression that could lead to the use of war to stop an aggressing State from attacking one of its neighbor States. I will pursue this issue in what follows.

Article 2, Section 4 of the United Nations Charter is a bold statement seemingly prohibiting States from initiating war:

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9. U.N. Charter, pmbl.
10. *Id.*
11. U.N. Charter art. 1, para. 1.

> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.[12]

This article only seemingly outlaws all initiation of war because of the effect on Article 2(4) of Article 51, which reads in its first half as follows:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.[13]

There has been much debate about how Article 2(4) and Article 51 are supposed to fit together. Some suggest that the use of the word "inherent" is the key to Article 51 as establishing its priority over Article 2(4), and hence of the acceptance of wars fought in self-defense. Others have argued that "until" is the key to Article 51 and this seems to give only a very limited right of unilateral action on the part of even those States that have been attacked.

I believe it is important also to examine the second part of Article 51 for help in interpreting its meaning:

> Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[14]

This is by no means clear-cut, but it seems to say that even the inherent right of self-defense does not impede the right of the United Nations to act to maintain or reestablish the peace. It thus appears that the key to the whole of Article 51 is not to give States a blanket self-defense exception to Article 2(4)'s prohibition on waging war, but to reaffirm that if war is to take place it is only under the auspices of the United Nations.

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12. U.N. Charter art. 2, para. 4.
13. U.N. Charter art. 51.
14. U.N. Charter art. 51.

In this context it is important to my interpretation of the United Nations Charter as something close to a contingent pacifist document that we examine the beginning of Chapter VII concerning threats to the peace and acts of aggression. Article 24(1) of the Charter asserts that the Security Council has "primary responsibility for the maintenance of international peace and security. . . ."[15] Any use of force that is legitimate under the UN Charter has to be recognized and authorized by the UN's Security Council.

Article 39 is one of the most important linchpins in my argument since it takes out of the hands of States the decision about whether to go to war. This article asserts:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.[16]

The United Nations here arrogates to itself the determination of whether the acts of one State are a threat to the peace that would require action by the United Nations through its member nations. The United Nations also again reaffirms that it is the body that decides what measures should be taken and by whom, even in cases of self-defense.

Article 41 lists the actions short of the use of armed force that the United Nations can employ, including "interruption of economic relations."[17] Article 42 specifies that the United Nations will use "action by air, sea, or land forces as may be necessary to maintain or restore international peace and security"[18] if Article 41 measures have failed.[19] The effect of these two articles, in combination with Article 39, is greatly to restrict what States can do in terms of initiating acts of war. It thus seems that one clear way to interpret Article 51 is merely as an emergency provision, where a State can act in self-defense only if the United Nations is not acting and only until the United Nations can react. On this interpretation, war as the world had known it, where States decided unilaterally when and whether to initiate war, was thus virtually prohibited.

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15. *Id.* at art. 24, para. 1.
16. *Id.* at art. 39.
17. *Id.* at art. 41.
18. *Id.* at art. 42.
19. *Id.*

There is, though, an exception for joint action by States under the auspices of the Security Council. Indeed some have argued that there is a requirement that States band together to address systematic human rights abuses. The use of force in such cases could be labeled a "just war." But I would argue that the kind of force envisioned in Articles 55 and 56 of the Charter, for instance, are not recognizably instances of "war" as this term has been employed over the centuries. Note that Articles 55 and 56 are grouped under Chapter IX, which has the title: "International Economic and Social Co-operation" not under a title concerning the use of force.[20] The kind of cooperation that is required is not primarily that of military force.

And so, even humanitarian intervention initiated by a single State seems not to be countenanced. And for this reason the Charter can be read to prohibit all use of force not sanctioned by the Security Council, even as there is a section of the Charter that seems to allow for armed conflict. Indeed, Article 42 states:

> Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.[21]

This reference to armed force is to a collective use of force by States authorized by the Security Council.

The United Nations Charter is close to a contingent pacifist document insofar as war and armed conflict as the world had known them, where States made unilateral decisions to attack one another, are proscribed. And the reason that the Charter is not fully a contingent pacifist document is because of the ambiguous way that wars conducted for State self-defense are treated. As we will see, there is a reasonable dispute about whether this form of war is allowed. If there is this exception recognized currently or at least into the foreseeable future, then the UN Charter would not necessarily oppose all contemporary wars. And hence for this and the rest of the reasons offered in this section, I regard the Charter as close to a contingent pacifist document, but not fully one.

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20. U.N. Charter art. 55-56.
21. *Id.* at art. 42.

IV. THE INTERNATIONAL COURT OF JUSTICE AND THE UN CHARTER

For further evidence of how the United Nations and its related institutions view recourse to war we can consult the International Court of Justice's (ICJ) cases interpreting Articles 2(4) and 51 of the UN Charter. This is an especially rich source of how to understand the Charter since the ICJ is itself an organ of the United Nations. In what follows I will look at three of the most important cases from the ICJ: the *Nicaragua Case* from 1986, the *Nuclear Weapons Case* from 1996, and the *Palestinian Wall Case* from 2004.

In a preliminary decision about the mining of Nicaragua's harbor by the United States from 1984, the ICJ favorably cited Nicaragua's claim "that there is no generalized right of self-defence."[22] There is here undoubtedly contemplated a difference between a generalized and a particularized right of self-defense. And then in the 1986 main case concerning the merits of Nicaragua's case against the United States, the ICJ made several important points that set the stage for my view that the United Nations Charter is close to a contingent pacifist document.

In the ICJ's 1986 *Nicaragua* (merits) case, the Court says that the principles concerning the use of force articulated in Article 2(4) of the UN Charter have a "binding character."[23] Hence, States are required to abstain "from the threat or use of force against the territorial integrity or political independence of any State."[24] The Court goes on to discuss Article 51's exception to the prohibition on the use of force due to considerations of self-defense. The clearest case of justified use of force in self-defense is "in the case of an armed attack which has already occurred."[25] For self-defense to justify the use of force by State A against State B, there has to have been an armed attack against State A by State B. In addition, the attack must also meet requirements of being of sufficient "scale and effects" to be more than a mere "frontier incident."[26]

The category of armed attack is severely delimited by the Court in the Nicaragua merits case. And before self-defensive use of force can be justified the State must have "immediately" notified the United Nations that it has been subject to an armed attack.[27]

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22. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 45, ¶ 92 (Nov. 26).

23. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 89, ¶ 188 (June 27).

24. *Id.*

25. *Id.* at 93, ¶ 194.

26. *Id.* at 93, ¶ 195.

27. *Id.* at 95, ¶ 200.

There is controversy about why the ICJ spends so much time in the Nicaragua case on this notification requirement. At least one plausible explanation is that even in cases of self-defense, a State must not act solely on its own. Notification of the United Nations is not the same as seeking approval, but the requirement of notification signals that justified use of force is not to be unilateral.

Of perhaps even more importance is that the ICJ for the first time clearly differentiated acts that are armed attacks and acts that fall short of being armed attacks. And the ICJ stipulated that when such latter acts have occurred the victim State does not have an inherent right to use force against the attacking State. States have a right of non-intervention, which does not rise to the level of the right of self-defense, and for which there is no inherent right to use force against the State that violates the right of non-intervention. There is a worry here that if there is an inherent right to use force against another State such a rule would admit of "serious abuses."[28] Similarly, respect for sovereignty will also not justify the use of force that would otherwise constitute an abridgement of Article 2(4).

Even in cases of self-defense, the ICJ is clear that the "inherent right" of self-defense is not unlimited. Principles of humanitarian law that require that acts be both necessary and proportionate to the attack are clear restrictions on even what is called an "inherent right" (in French the term used is *droit naturel*—natural right). But when such an inherent right is not applicable, "the criteria of necessity and proportionality take on a different significance."[29] The Court is clear that if the strict requirements of an armed attack are not met then it will be much harder to satisfy necessity and proportionality requirements in justifying the use of retaliatory force. Here is the Court's summary:

> On the legal level, the Court cannot regard response to an intervention by Nicaragua as such a justification. While an armed attack would give rise to an entitlement to collective self-defence, a use of force of a lesser degree of gravity cannot . . . produce any entitlement to take collective counter-measures involving the use of force.[30]

The ICJ's interpretation of the UN Charter makes it very difficult, although not impossible, to justify recourse to war, just as is true of the contingent pacifist position.

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28. *Id.* at 96, ¶ 202.
29. *Id.* at 112, ¶ 237.
30. *Id.* at 117, ¶ 249.

In the ICJ's *Nuclear Weapons Case* from 1996 the Court at one point seemed to go back on its earlier idea that there is no generalized right of self-defense when it said:

> [T]he Court cannot lose sight of the fundamental right of every State to survival, and thus to its right to resort to self-defense, in accordance with Article 51 of the Charter, when its survival is at stake. Nor can it ignore the practice referred to as a "policy of deterrence," to which an appreciable section of the international community adhered for many years.[31]

Yet, earlier in this advisory opinion the Court said: "The entitlement to resort to self-defense under Article 51 is subject to certain constraints. Some of these constraints are inherent in the very concept of self-defence . . . [such as] the conditions of necessity and proportionality."[32]

It thus seems that there is a particularized right of self-defense that States have but not one that is generalized and unlimited. The Article 51 right is not a right that allows any measures when self-defense is at issue. Indeed the Court said that "[s]tates do not have unlimited freedom of choice of means in the weapons they use."[33]

The highly controversial penultimate decision of the ICJ *Nuclear Weapons Case* shows how tentative the Court is about its view of the justifiability of initiating war even in self-defense, and also how the Court nonetheless refuses to rule out the possibility of justification of such a war in the future. Here is the decision and reasoning for Question E:

> By seven votes to seven, by the President's casting vote,
> It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;
> However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme

31. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. (July 8) 41, ¶ 96.

32. *Id.* at 22-23, ¶¶ 40-41.

33. *Id.* at 35, ¶ 78.

> circumstance of self-defence, in which the very survival of the State would be at stake.[34]

As I will argue in more detail later, this certainly seems to be consistent with seeing the United Nations Charter as close to a contingent pacifist document.

One last case to consider is the ICJ's 2004 *Palestinian Wall Case*. The Court gives the same nuanced reading of Article 2(4) as the two previous ICJ cases we have examined. The court also reaffirmed the idea that "[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal."[35] The Court then responds to Israel's contention that the Wall was important for "military exigencies," largely related to stopping Palestinian insurgents from mounting attacks on Israeli citizens. The Court argues that the restrictions on the movement of Palestinians must meet a high threshold consideration:

> [I]t is not sufficient that such restrictions be directed at the ends authorized; they must also be necessary for the attainment of those ends. As the Human Rights Committee put it, they "must conform to the principle of proportionality" and "must be the least intrusive instrument amongst those which might achieve the desired result."[36]

It should be noted that Article 51 was said not to be relevant to the case because Israel was not responding to a threat from another State.[37]

The Court thus endorses a substantial limitation on self-defense claims, or a state of necessity, which might allow for the justified use of force or recourse to war. Even though the Court recognizes that Israel has various legitimate security demands to respond to, including "numerous indiscriminate and deadly acts of violence against its population," the construction of the wall is not justified because the Court is "not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction."[38] Notice that the ICJ here sets a very high threshold for satisfying necessity, even in a case where self-defense of Israel's citizens is at stake.

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34. *Id.* at 43-44, ¶ 105.

35. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 39, ¶ 87 (July 9).

36. *Id.* at 60, ¶ 136.

37. *Id.* at 62, ¶ 139.

38. *Id.* at 62-63, ¶¶ 140-141.

V. THE DEBATE ABOUT INTERPRETING THE CHARTER

Nearly all commentators agree that the original intent of the UN Charter was to outlaw war as the world had known it. But there is a serious disagreement about how States have chosen to regard the Charter, especially in light of the inability of the Security Council to play the active role envisioned by the Charter in mediating disputes between States and issuing sanctions to those States that did not follow the dictates of the Charter. In this section I will rehearse some of this debate and indicate why these views all by and large support the interpretation of the Charter, at least given its original intent, that I have indicated above, namely that the Charter is normatively close to a contingent pacifist document.

In a very influential article, Louis Henkin defended the view that the Charter should be read as outlawing nearly all forms of war.[39] Early in the article, Henkin contends that:

> The Charter reflected universal agreement that the status quo prevailing at the end of World War II was not to be changed by force. Even justified grievances and a sincere concern for "national security" or other "vital interests" would not warrant any nation's initiating war. Peace was the paramount value. . . . War was inherently unjust. In the future the only "just war" would be war against an aggressor—in self-defense by the victim, in collective defense of the victim by others, or by all. . . . Change—other than internal change through internal forces—would have to be achieved peacefully by international agreement. Henceforth there would be order so that the international society could concentrate on meeting better the needs of justice and human welfare.[40]

Henkin indicates that there were a host of ambiguities and unclarities that needed to be resolved, but that the original idea behind the UN Charter was clear.

Henkin then discusses how the Charter has been received especially by States around the world:

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39. Louis Henkin, *The Use of Force: Law and U.S. Policy*, *in* Right v. Might: International Law and the Use of Force (Council on Foreign Relations 1989), *as reprinted in* Mark W. Janis & John E. Noyes, International Law: Cases and Commentary 420 (1st ed. 1997).

40. *Id.*

> Governments generally have insisted on the interpretations most restrictive of the use of force: the Charter outlaws war for any reason; it prohibits the use of armed force by one state on the territory of another or against the forces, vessels, or other public property of another state located anywhere, for any purpose, in any circumstances. Virtually every use of force in the years since the Charter was signed has been clearly condemned by virtually all states. Virtually every putative justification of a use of force has been rejected. Over the years since the Charter's adoption, even states that have perpetrated acts of force, when seeking to justify their acts, have not commonly urged a relaxed interpretation of the prohibition. . . . Indeed, the community of states has acted formally to tighten the Charter's restrictions.[41]

Henkin acknowledges that exceptions have been recognized, such as wars fought for humanitarian reasons or in support of self-determination of peoples. He points out that "[i]t has not been accepted, however, that a state has a right to intervene by force to topple a government or occupy its territory even if that were necessary to terminate atrocities or to liberate detainees."[42]

Yet, Article 51 has also been interpreted to allow a State to defend itself, despite the prohibitions on the unilateral use of force. And here there has been quite a variety of opinions. Nonetheless, everyone agrees, says Henkin, that "the right of self-defense, individual or collective, is subject to limitations of 'necessity' and 'proportionality.' "[43] And as we saw in a previous section, courts have given fairly strict readings of these requirements. Henkin makes a good case for the proposition that the UN Charter can be read as close to a pacifist document.

In another very influential article, Michael Reisman argued for a somewhat different interpretation of the Charter from that of Henkin. He begins his essay by stating his view in opposition to those like Henkin:

> Its [Article 2(4)] sweeping prohibition of the threat or use of force in international politics was not an autonomous ethical affirmation of nonviolence . . . . Article 2(4) was embedded in and made initially plausible by a complex security scheme, established and spelled out in the United

41. *Id.* at 421.
42. *Id.* at 422.
43. *Id.* at 424.

> Nations Charter. If the scheme had operated, it would have obviated the need for the unilateral use of force.[44]

For Reisman, that security scheme has faltered due to the weakness and stalemate at the Security Council resulting in the effective abrogation of the lofty ideals of the UN Charter's Article 2(4).

Since the security scheme has not worked, the UN has basically left it to the strongest States to impose their will on the rest of the States. Indeed, Reisman argues that given the actual political situation on the ground, "a mechanical interpretation of Article 2(4) may be to superimpose on an unwilling polity an elite, an ideology, and an external alignment alien to its wishes" including "grave deprivation of human rights for substantial numbers and strata of the population."[45] But Reisman seems to recognize that such a mechanical interpretation of Article 2(4) of the Charter sets rather stringent limits on what States can initiate unilaterally concerning the use of force.

Another highly influential scholar who entered the debate about how to understand the UN Charter's Article 2(4) is Thomas Franck. Franck argued that there is a pronounced two-tiered structure to the UN Charter's attempt to regulate the use of force by States.[46] What he called the "upper tier" set out "a normative structure for an ideal world."[47] The intent of the Charter at the upper tier envisioned the ideal that:

> Collective security is to be achieved by use of international military police forces and lesser but forceful measures such as diplomatic and economic sanctions. Recourse to such measures is to be the exclusive prerogative of the United Nations, acting in concert.[48]

Wars, as they had been known, where States initiated the use of force unilaterally, were to be replaced by a world-wide police force that operated very differently from normal armies.

Franck also postulated that there was a lower tier that came into operation when it was clear that the ideal was not working. In this more realistic tier States may operate on their own when

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44. W. Michael Reisman, *The Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279 (1985), *reprinted in* MARK W. JANIS & JOHN E. NOYES, INTERNATIONAL LAW: CASES AND COMMENTARY 426 (1st ed. 1997).

45. *Id.* at 429.

46. THOMAS FRANCK, RECOURSE TO FORCE 3 (2002).

47. *Id.*

48. *Id.* at 2.

self-defense requires it, "subject to certain conditions."[49] But even this more realistic realm was soon seen to fail because of the advent of the Cold War and the ingenuity of States to design indirect means of aggression, often through the use of insurgents.[50] So, on this analysis, whatever the promise of the UN Charter, States found ways not to limit their initiating of war. The question to ask is whether the restrictions that States are subject to even when they initiate war for self-defense are so significant as basically to rule out war.

As we saw in Section IV, a string of decisions by the International Court of Justice seemingly favors the view that the use of force characteristic of war is indeed outlawed by the Charter. Even the exception for self-defense is so circumscribed that it makes the use of force very different from what it had been. Indeed, Franck worries that the way the Charter has been interpreted has made it impossible for a State to respond effectively to self-defense concerns because the State must wait until it has been the subject of an armed attack before it can act to defend itself, and this is often too late.[51] Notice that Franck's complaint actually supports the view that the Charter is close to a contingent pacifist document.

Nearly all commentators agree that the original idea behind the UN Charter was to abolish war, at least as the world had known war. The commentators do not even disagree about how the international courts have interpreted the Charter. The disagreements we have just rehearsed are primarily about how policy makers have interpreted the Charter. And here it is clear that the Charter has not managed to eliminate war as we have known it. But again, this does not mean that the Charter is not normatively close to a contingent pacifist document. Contingent pacifism is a normative doctrine, not a doctrine that describes or even explains what States actually do in the world today. As a normative matter, very few commentators disagree that the UN Charter was meant to condemn war and to urge that war should be abolished.

VI. HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW

I next turn to *jus in bello* matters, spending the next three sections developing an argument for seeing a trend toward granting

49. *Id.* at 3.
50. *Id.* at 3-4.
51. *Id.*

human rights greater significance during war and this means that international law is moving close to a contingent pacifist position. The law is still not settled but today nearly everyone agrees that human rights law is applicable in at least some wartime situations. In this section, I shall first examine this issue as it arose in several international court cases.

In the 1996 case on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ summarized the arguments of certain States: "the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict."[52] The ICJ rejected this position arguing as follows:

> [T]he protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.[53]

The ICJ thus rejects the traditional separation of humanitarian and human rights law, allowing that human rights law has application in all contexts, but that then sets up a possible conflict with humanitarian law in armed conflict cases.

In the 2004 case on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, the International Court of Justice portrays the arguments of the State of Israel as follows:

> Israel denies that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which it has signed, are applicable to the occupied Palestinian territory. It asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended

52. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 17, ¶ 24 (July 8).

53. *Id.* at 18, ¶ 25.

> for the protection of citizens from their own Government in times of peace.[54]

The position of Israel summarizes the traditional separation of humanitarian and human rights law. But the ICJ declares that that understanding has been rejected since at least the 1996 *Nuclear Weapons Case*.[55]

In the *Palestinian Wall Case*, the ICJ said that "the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory."[56] Thus the ICJ rejected Israel's claim that there is a clear separation of humanitarian and human rights law, and allowed that human rights law can be applicable to times of war or armed conflict especially concerning the right to life. Human rights are characterized as having universal scope, both in terms of who is subject to the rights and in terms of the addressee of these rights who must protect them.

If the most basic of the human rights, the right to life, is applicable in times of war it seems, on first sight, that war itself would never be justified given that all wars involve massive deprivations of the right to life of civilians and soldiers. And this would mean that human rights law directly conflicts with humanitarian law, which has traditionally recognized that the killing of soldiers can be justified as long as the soldiers are not made to suffer unnecessarily. And it is a longstanding part of humanitarian law that civilians can be justifiably killed during war as long as they are not directly targeted and their killing is necessary and also proportionate to legitimate military objectives.

So, international law is faced with conflicting norms concerning violations of the right to life during times of war. The right to life is a core right of the Covenant on Civil and Political Rights and cannot be abrogated even during times of national emergency. Yet, in such emergencies, mounting an armed defense or counter-attack may be the only way for a State to survive the hostile aggression of a neighbor State. In such a case, recourse may be made to the doctrine of *lex specialis* referred to by the ICJ to allow for humanitarian law concerns still to trump those of human rights law. I discuss this issue later in this chapter.

Some notable interpreters of this controversy have recently seen the insertion of human rights law into war and armed conflict

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54. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 102 (July 9).

55. *Id.*

56. *Id.* at 47, ¶ 109.

situations as a pacifist challenge. The International Committee of the Red Cross issued an Interpretive Guidance on Direct Participation in Hostilities that employs human rights law greatly to restrict justifiable killing during armed conflict. The applicable part of Section IX of the ICRC's Guidance states:

> In conjunction, the principles of military necessity and of humanity reduce the sum total of permissible military action from that which IHL [International Humanitarian Law] does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances.[57]

Seemingly, each decision of a commander to be legal must meet the necessity test—it must be the only way that a legitimate military objective can be accomplished.

One significant implication of the ICRC's view of human rights law is that during armed conflict "it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force."[58] Such a restriction makes most tactical decisions during time of war very difficult for commanders to justify, seemingly supporting something like a contingent pacifist position. Of course, the ICRC Guidance concerns civilians who are taking an active part in hostilities, not combatants proper. But I would argue that the line between these two categories is getting less and less clear.

Various scholars have debated whether the ICRC has a correct understanding of what *is* the current state of *jus in bello* international law, *lex lata*. From my perspective, what matters more is whether or not they have a defensible view of what the current state of international law *should be*. Jann Kleffner has been somewhat skeptical but has recognized that if the ICRC guidance is accepted as *lex lata* and not just *lex ferenda* it would indeed change the way we think of the legality of war.[59] I would concur in his assessment, and add that this would be a welcome result, moving us closer to the United Nations' founding idea that war, as we have known it, is to be outlawed.

Another source to consider is a decision by the High Court of Israel in 2005. Here the Israeli Court held that "a civilian taking

57. ICRC's Guidance, *supra* note 3.

58. *Id.* at ¶ 82.

59. Jann F. Kleffner, *Section IX of the ICRC Interpretive Guidance on Direct Participation in Hostilities: The End of Jus in Bello as we Know It?*, ISR. L. REV., Mar. 2012, at 35, 35-52.

part in direct hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed."[60] The Israel Court came to its decision that its security forces could not confront terrorists in any manner they deemed appropriate. In the conclusion of the opinion, the Court tackles the central jurisprudential problem in this area.

> The saying "when the cannons roar, the muses are silent" is well known. A similar idea was expressed by Cicero, who said: during war, the laws are silent" (*silent enim legis inter arma*). Those sayings are regrettable. They reflect neither the existing law nor the desirable law . . . Every struggle of the state—against terrorism or any other enemy—is conducted according to rules and law.[61]

The Court goes on to say that there is not a conflict but a close fit between the pursuit of national objectives and the protection of human rights.[62]

Those in Israel would have more reason than others to disregard human rights in favor of self-defense given that Israel is surrounded by its enemies, and attacked often by them. But the High Court of Israel recognized that the battle against terrorism and its other enemies is also a battle of values.[63] In that latter battle, restraint is crucial—even restraint that would rule out many standard tactics of war. The international legal scholars, Theodor Meron[64] and William Schabas,[65] have also concluded that taking human rights seriously in war or armed conflict today will move us close to pacifism. In my view, this is indeed the direction that international law should be moving toward as well.

VII. RECONCILING HUMAN RIGHTS AND HUMANITARIAN LAW

There is a debate about how to reconcile international humanitarian law and human rights law in armed conflict situations. As we saw earlier, the ICJ referred to the doctrine of *lex*

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60. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Israel [Dec. 13, 2006] (Isr.), slip op. ¶ 40, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf.

61. *Id.* at ¶ 61.

62. *Id.* at ¶ 62.

63. *Id.* at ¶ 45.

64. THEODOR MERON, THE HUMANIZATION OF INTERNATIONAL LAW 9 (2006).

65. William Schabas, *Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus ad Bellum*, 40 ISR. L. REV. 592 (2007).

specialis as the way to resolve the difficulty.[66] In the *Nuclear Weapons* Advisory Opinion, the ICJ said:

> The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant [International Covenant on Civil and Political Rights], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[67]

This is the ICJ's attempt to reconcile the conflict and save humanitarian law from being completely swamped by human rights law.

This statement of the *lex specialis* doctrine seems to give priority to humanitarian law over human rights law when it says conflicts must "be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself," where the Covenant refers to the articulation of human rights law.[68] But another way to understand the final part of the test is that human rights law alone does not determine what the applicable law is—but it must be decided also by reference to international humanitarian law.

Notice that the test is to be employed anew for every "particular loss of life."[69] What is needed is a determination of whether this particular loss of life falls under an applicable humanitarian law. The laws of war articulated in the Hague and Geneva Conventions, for instance, mention highly specific kinds of weapons and tactics that are proscribed. If the weapon or tactic about to be employed is in those lists, then that is the applicable restraint. Yet it is unclear what to do if the particular loss of life does not fall under one of these provisions of humanitarian law.

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66. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 45-46, ¶ 105 (July 9) (quoting Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 18, ¶ 24 (July 8)).

67. Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 18, ¶ 25 (July 8). *See also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 46, ¶ 106 (July 9); Armed Activities in the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 78-79, ¶ 216 (Dec. 19).

68. Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 18, ¶ 25 (July 8).

69. *Id.*

Two possibilities are reasonable interpretations of the *lex specialis* doctrine: (a) all acts and weapons not specified as proscribed in humanitarian law are allowed; or (b) all acts and weapons not specified in humanitarian law as proscribed are then regulated by human rights law.

The ICJ's *Palestinian Wall Case* can be cited to confirm the reasonableness of both of these positions.

> As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both of these branches of international law. . . namely, human rights law and, as *lex specialis*, international humanitarian law.[70]

The ICJ prefaced these remarks by noting that "the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights."[71] Yet, as noted above the right to life is not one of the rights that can be derogated.[72]

So, it seems to me that there is a serious interpretive problem that calls for resolution. The problem arises at least in part because in human rights law, the right to life is not derogable. And yet, in humanitarian law certain deprivations of the right to life are not considered arbitrary and are hence open to be allowed, or in other terms open to be derogated. On a straightforward reading of these two provisions there does not seem to be a way to reconcile human rights and humanitarian law concerning deprivations of the right to life that seem inevitably to occur in times of war and armed conflict. *Lex specialis* seems to be a doctrine that conflicts with the human rights law of the Covenant on Civil and Political Rights.

Yet, as we have seen the *lex specialis* doctrine is referred to for a resolution of the conflict between regimes of law in several ICJ opinions.[73] One way to understand the doctrine is that unless there

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70. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 46, ¶ 106 (July 9).

71. *Id.*

72. *Id.* at 45-46, ¶ 105.

73. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 45-46, ¶ 105 (July 9) (quoting Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 18, ¶ 24 (July 8)).

are specific rules of humanitarian law which apply to a given situation, that situation is governed by human rights law. This liberal understanding of *lex specialis* also needs to be qualified by the requirement that certain rules of humanitarian law that would otherwise allow for non-arbitrary killing during war are to be overruled by human rights law.

> According to the Covenant, the right to life only protects against the *arbitrary* deprivation of the right to life, so *lex specialis* can be seen as not in tension with the Covenant insofar as it merely indicates that humanitarian law can be appealed to in some cases to show that the deprivation of the right to life was not arbitrary.[74] So, the question becomes: which are the deprivations of the right to life during wartime that are arbitrary and which are not.

Soldiers' lives are not to be taken in a way that violates the requirement that lives should not be taken arbitrarily. If this is indeed the right way to understand the *lex specialis* doctrine then we can understand why the ICRC Guidance says that if there is some other way to accomplish a given military objective other than killing an enemy soldier that action must be taken instead of killing the enemy soldier.[75] The ICRC Guidance does not say that all killing in war is outlawed, but makes it very difficult for commanders to wage war.[76] In every instance the commander must not authorize the killing of enemy troops if they can be disabled or captured instead.[77] And even in emergency situations, this must be the rule since the right to life is not to be derogated in times of emergency, as the Covenant has specified.[78]

In my view, such an understanding of the doctrine of *lex specialis* in effect moves *jus in bello* international law close to a contingent pacifist position. The strategies and weaponry that are allowable during war or armed conflict become greatly restricted by the new orientation toward human rights. And the *jus in bello* conditions will be very hard to satisfy in any given war. In the previous sections of this paper we have also seen that the *jus ad bellum* is also very hard to reconcile with a certain understanding of international law as well. In both cases, war as we have known

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74. International Covenant on Civil and Political Rights, art. VI, ¶ 1, Dec. 16, 1966, 999 U.N.T.S. 171.

75. ICRC's Guidance, *supra* note 3.

76. *See id.* at 9-85.

77. *Id.* at 82.

78. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 45, ¶ 102 (July 9).

it cannot be conducted without violating international legal requirements. At some point in the distant future it may be possible to satisfy the *jus in bello* and *jus ad bellum* requirements understood through the lens of human rights law, but it is hard to see that this will happen now or in the foreseeable future, just as is held by contingent pacifists.

VIII. THE ST. PETERSBURG DECLARATION AND THE LIEBER CODE

The seeming change in the burden of proof for commanders concerning whether they can use lethal force, as understood by the human rights approach, is not completely new. Indeed, in the first major statement of the law of war in modern times, the St. Petersburg Declaration stated:

> [T]hat the progress of civilization should have the effect of alleviating as much as possible the calamities of war; That the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is *sufficient to disable* the greatest possible number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; That the employment of such arms would, therefore, be contrary to the laws of humanity.[79]

Notice that the proper aim of military operations is said to be to "disable the greatest possible number of men,"[80] not to kill as many of the enemy as one can. And such a declaration was said to be necessary "in order . . . to conciliate the necessities of war with the laws of humanity."[81]

Here already in 1868 is the core of the human rights approach to killing during war. As a conceptual matter this makes perfect sense. The *jus in bello* principle of necessity should be seen to stipulate that military tactics are illegal unless there is no other way of achieving a legitimate military objective. The principle of necessity would be violated by a tactic that called for killing enemy soldiers when disabling them will accomplish the same objective. So the human rights approach to *jus in bello* requirements that was sketched above is actually not very radical at all since it is

79. St. Petersburg Declaration, *supra* note 5.
80. *Id.*
81. *Id.*

supported in historical documents that are canonical and also supported by good reasons.

If commanders are mainly to be justified in disabling enemy soldiers, then only in certain very limited cases are they justified in killing enemy soldiers. If enemy soldiers can be disabled by being wounded, or captured, then these strategies must be clearly contemplated before it is justified to kill enemy soldiers. Yet, for commanders in the field, attempting to ascertain what tactics satisfy *jus in bello*, most killing will then be outlawed. But, commanders are not currently trained as much in tactics that non-lethally disable rather than kill the enemy. So, war as we know it would change radically. And we are moved close to contingent pacifism—to a position where war and armed conflict is possible in principle but not at the current time or into the foreseeable future.

In addition, we should consider another seminal Nineteenth Century document that also could be seen to take a similar stance, namely the Lieber Code.[82] Unlike the St. Petersburg Declaration, the Lieber Code does seem to countenance a broad array of killing during war:

> Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor . . . . Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.[83]

Notice two things here. First, killing must be necessary for it to be legal. Second, the rules of war are thought to be intimately connected to what it means to be a moral soldier.

The Lieber Code was drafted by Francis Lieber for the Union Army during the US Civil War. Lieber set out to diminish the carnage of war and to provide rules that would be supported by legal practice and also by morality. Military necessity was the key component of the rules of war as Lieber understood them.[84] At

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82. U.S. Dep't of War, Gen. Order No. 100, art. 15, Instructions for the Government of Armies of the United States in the Field (1863), available at http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=A25AA5871A04919BC12563CD002D65C5&action=openDocument.

83. *Id.*

84. *Id.*

least one *lex ferenda* understanding of military necessity refers to what it is indispensable to do in order to achieve legitimate military objectives. Limiting military activities on the battlefield to those that are militarily necessary was the key to humanizing war. So, while killing could be justified by military necessity there had to be a deliberative act, where all other options are considered and found lacking, which preceded the commander's order to kill enemy soldiers.

In addition, we should also consider other limits posed by military necessity on tactics and weaponry in the Lieber Code.

> Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.[85]

Again notice how extensive the rules are in terms of what acts of war are ruled out. The chief case here is where the killing of these soldiers is not necessary in the sense that disabling the soldiers would have achieved the same military objective. In this sense, as well as several others, the Lieber Code sets similar limits on killing during war to that of the St. Petersburg Declaration, despite their superficial dissimilarity.

IX. CONCLUDING THOUGHTS

In the previous sections I have argued that international law embodies something close to contingent pacifism. The U.N. Charter, as a source of the *jus ad bellum*, embodies the idea, in Articles 2(4) and 51, that wars should not be fought by States except when the U.N. has sanctioned them or in emergencies involving individual or collective State self-defense, and even then only until the U.N. can respond. This is at least similar to a contingent pacifist position since States are nearly outlawed from engaging in war. It is only nearly a contingent position because there is one class of exceptions, where a State's self-defense is involved and the U.N. has not yet acted. And while this is thought to be a rare instance it could occur in the foreseeable future.

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85. *Id.* art. 16.

It is true that contingent pacifists hold that there are no instances of justified war in the foreseeable future. The U.N. is thus only "close to" a contingent pacifist institution, in that war is ruled out for States only in nearly all cases—and this becomes the default position. Contingent pacifism, nearly so, is on the continuum between a robust Just War position and a traditional pacifism. Both this view and regular contingent pacifism are middle positions that are contingent on the current conditions of political leaders and military tactics, with the conclusion that very few if any wars are justified today.

In addition to the above discussed *jus ad bellum* issues, from a *jus in bello* perspective, a few additional things need to be said. First, the risk of civilian casualties is very high in today's armed conflicts. While some weapons have achieved a greater level of accuracy, thereby potentially reducing the likelihood of collateral damage, it is also true that war and armed conflict is increasingly fought in cities where civilian casualties remain very high indeed. And civil wars are the most common type of war at the moment and also into the foreseeable future. In civil wars, civilian casualties are very difficult to minimize since combat operations often proceed by means of terrorizing tactics aimed at civilian centers, as I have also argued elsewhere.[86] And the use of human shields also exacerbates *jus in bello* concerns.[87]

Second, contemporary wars are increasingly not being fought by States but by non-State actors. The American Society of International Law has recently focused its annual conventions on the fact that the old rules of engagement do not seem to be relevant to the kind of asymmetrical armed conflict today. Insurgent combatants from non-State actors are not being trained in the law of war, and are often ignorant of this law. Legal rules such as those found in the Geneva Conventions are designed to make wars less likely to violate *jus in bello* considerations. But when combatants do not know of such rules, as is increasingly true today, wars will not be likely to be legal or just wars from the perspective of tactics and weaponry.

It is a fact that war today is not often of the interstate variety. More commonly war is conducted between a State and a non-State actor, or between two groups struggling for control of a State, as in a civil war. The tactics that are used in these "new" wars are virtually the same as those used in the older interstate wars, but the application of the UN Charter's Article 2(4) has been called

86. *See generally* LARRY MAY, WAR CRIMES AND JUST WAR 93-117 (2007).

87. *See* MICHAEL NEWTON AND LARRY MAY, PROPORTIONALITY IN INTERNATIONAL LAW Ch. 9 (2014).

into question by many commentators. If for no other reason, the UN Charter envisioned the use of force as being something employed by one State against another State and yet this is not at all what is the normal use of force today.

There is ample evidence for thinking that the UN Charter does not rule out wars of liberation or wars of secession that are aimed at ending oppression. Thomas Franck cites many of these sources as does Louis Henkin. So, in this respect if not in others, there are "wars" that the UN Charter would countenance. This means that the UN Charter is only close to a contingent pacifist document. Yet, it is also not completely clear what contingent pacifists would say about wars of liberation. Those traditional pacifists who opposed all war as well as all violence would of course not support wars of liberation. But the contingent pacifists today, as well as those in the past such as Erasmus, might very well support such "wars," perhaps not being willing to call them wars at all or perhaps seeing that it is in principle possible to support wars such as these, while still thinking they will be very rare indeed.

Christine Gray has emphasized a different aspect of the Nicaragua decision of the ICJ than I did earlier.[88] She thinks that the Court "seems to have accepted the possibility of a dynamic interpretation of Articles 51 and 2(4) based on the development of state practice."[89] I am in large-scale agreement with Gray's analysis on this issue. But I do not think that the strategy of using force for humanitarian purposes in so-called "humanitarian intervention" is consistent with the spirit of the development of international law. And this seems even more to be the case when considering the original intent, and even the subsequent interpretations, of the Charter by the International Court of Justice and other courts. The possibility of a justified war of humanitarian intervention must indeed be conceded, but the UN Charter's guiding ideals could not be reconciled with more than the rarest of such interventions today.

In this paper I have defended the controversial thesis that international law today is close to a form of pacifism that I have called contingent pacifism. The UN Charter seems to embrace something close to contingent pacifism concerning *jus ad bellum*. And human rights law seems to embrace something close to contingent pacifism concerning *jus in bello*. It seems to me time for more scholars to start focusing on the pacifist implications of

88. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 8 (2d ed. 2004).
89. *Id.*

contemporary developments in international law concerning both the law of the use of force and the law of war.[90]

90. The author thanks Shannon Fyfe for assistance on this article.